

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF COMMERCIAL REALTY ST. PETE, INC.
File No. 519WT0002

Applications for Licenses in the Interactive Video and Data Services

FCC 96-400

Adopted: October 2, 1996
Released: October 21, 1996

By the Commission:

I. INTRODUCTION & EXECUTIVE SUMMARY

1. Commercial Realty St. Pete, Inc. (Commercial Realty), a corporation wholly owned by James C. Hartley and Teresa Hartley, has filed an Opposition to Notice of Apparent Liability for Forfeiture (NALF) for the sum of \$390,000, which was adopted on February 15, 1995, and released on February 16, 1995. See Commercial Realty St. Pete, Inc., 10 FCC Rcd 4277 (1995). Commercial Realty sets forth in its pleading several arguments in support of its Opposition and denies any liability. For the reasons stated below, the finding of liability contained in the NALF is affirmed.

II. BACKGROUND

2 On July 28 and 29, 1994, the Commission conducted an auction for 594 Interactive Video and Data Services (IVDS) [FN1] licenses in 279 markets across the nation. Winning bidders at the auction were required, inter alia, to tender on or before August 8, 1994, down payments sufficient to bring their amount on deposit with the government up to 10 percent of their total winning bids (or adjusted bid, if a bidding credit was claimed). Commercial Realty submitted winning bids for IVDS licenses in 20 markets for a total amount of \$41,250,000, making it the auction's largest single bidder. In the case of Commercial Realty, its required total down payment was at least \$3,266,750. Commercial Realty failed to tender its down payment.

3. In the wake of the defaults, the Commission ordered an investigation of the conduct of the applicants in the IVDS auction to determine whether

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misconduct had occurred. As a result of the investigation, the Commission issued the NALF, which determined that Commercial Realty had apparently violated the Commission's anti-collusion restriction by attempting to discourage other bidders from making down payments, that it had apparently abused the Commission's processes by improperly claiming bidding credits as a woman-owned business, and that it had violated the Commission's Rules by apparently willfully misrepresenting that it was qualified to incur financial obligations exceeding \$40,000,000. As a result, the Commission informed Commercial Realty of its apparent liability for a forfeiture totaling \$390,000. [FN2]

III. OPPOSITION TO NALF

4. Commercial Realty contends that there is no legal basis for the Commission's findings. Regarding the Commission's determination that Commercial Realty violated the anti-collusion restrictions, Commercial Realty, while acknowledging that the courts have sustained prohibitions against improper contacts, claims that the Commission has failed to demonstrate that contacts between Commercial Realty and other bidders, if they occurred, were improper. Commercial Realty asserts that the Commission is precluded by the First Amendment of the United States Constitution from prohibiting contacts between or among bidders. Moreover, Commercial Realty claims that it did not violate the anti-collusion rules because it was entitled, if not duty bound, to alert other bidders that the spectrum it purchased had been sold under false pretenses.

5 Commercial Realty next argues that it did not abuse the Commission's processes by claiming status as a woman-owned business. In this regard, Commercial Realty submits that women are not required to devote their full time and attention to the day-to-day management of the business in order to be entitled to claim eligibility as a woman-owned business. Rather, Commercial Realty argues that an entity is entitled to be treated as a woman-owned business if women own 50.1 percent of the equity and control the business. Commercial Realty states that it has exceeded these requirements. Commercial Realty points out that Teresa Hartley, a woman, owns 60 percent of its stock and it claims that she also controls the corporation. The remaining 40 percent is owned by James C. Hartley, Mrs. Hartley's husband. In support of its claim that control lies with **Teresa Hartley**, Commercial Realty says that Mrs. Hartley has regularly worked in the Hartley family businesses in the past, keeping books and writing checks. She attended the auction with her husband. Mrs. Hartley also testified during the Commission's investigation that, assuming Commercial Realty had been successful in obtaining IVDS licenses, she expected to become involved in Commercial Realty's day-to-day operations. Finally, Commercial Realty alleges that Mrs. Hartley personally loaned Commercial Realty \$60,000, part of which it used to make up front payments [FN3] at the IVDS auction.

6. Lastly, Commercial Realty argues that it did not violate any rules

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regarding its financial qualifications. Commercial Realty asserts that unlike the broadcast services, in which the Commission has prescribed specific standards for determining financial qualifications, [FN4] the Commission has not specified any particular financial requirements that IVDS applicants must satisfy. Accordingly, says Commercial Realty, because IVDS applicants are not required to present the Commission with detailed estimates of their construction and operating costs, applicants are under no obligation to present any representation concerning their financial ability.

IV. DISCUSSION

7. In view of the fact that Commercial Realty generally disputes the legality of the IVDS rules, its Opposition is essentially an untimely Petition for Reconsideration of the Fourth Report and Order, 9 FCC Rcd 2230 (1994), which established rules and procedures for auctioning IVDS licenses. Section 1.429(d) of the Commission's Rules mandates that petitions for reconsideration of Commission rulemaking proceeding be filed within 30 days of the announcement of the Commission's final action, i.e., the date that the item was published in the Federal Register, which in this case was May 13, 1994. 59 Fed. Reg. 24,947 (1994). Accordingly, the deadline for filing petitions for reconsideration was June 13, 1994. See 47 C.F.R. § 1.4(b). Commercial Realty filed its Opposition on March 15, 1995. Nevertheless, we shall address the substance of Commercial Realty's arguments below.

8. Section 1.2105(c) of the Commission's Rules, which contains the Commission's anti-collusion provisions, specifies, in part, that "all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids . . . with other bidders until after the high bidder makes the required down payment" 47 C.F.R. § 1.2105(c). Commercial Realty does not deny that Mr. Hartley, who is one of the applicant's two principals, initiated at least two prohibited pre-down payment meetings with the president of another winning bidder, Interactive America Corporation. [FN5] Rather, it claims that the Commission's anti-collusion rules are too restrictive and thus violate the First Amendment by prohibiting "any or all contacts between bidders, prospective bidders or anybody else." Commercial Realty apparently misconstrues the Commission's requirements. Section 1.2105(c) of the Commission's Rules is considerably narrower in scope than alleged by Commercial Realty. The restrictions are applicable only to bidders. Bidders are prohibited from cooperating, collaborating, discussing or disclosing the substance of their bids with other bidders until after the high bidder makes the required down payment. Commercial Realty's claim that the Commission's anti-collusion restrictions violate the rights guaranteed to Commercial Realty by the First Amendment is also ill founded. Commercial Realty has not stated what it believes these rights are or how they have been abridged, but appears to view

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the anti-collusion restrictions as an unreasonable restraint of expression. Commercial Realty has proffered no legal authority, aside from its bald reference to the First Amendment, to support its claim.

9. Neither Commercial Realty's, nor any other bidder's, First Amendment rights have been abridged as a result of the Commission's anti-collusion restrictions. The Commission's anti-collusion restrictions are similar to those contained in Section 1 of the Sherman Antitrust Act, which also places reasonable restraints on collusive action by prohibiting persons from conspiring to restrain trade or commerce. 15 U.S.C. § 1 (1976). These prohibitions against arrangements that are "unreasonably restrictive of competitive conditions," repeatedly have been upheld by the Supreme Court against First Amendment attacks. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1910).

10. A government regulation does not infringe an individual's freedom of expression if it directly advance's a substantial government interest and is no broader than necessary to achieve that objective. See, e.g., *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *United States v. Harries*, 347 U.S. 621 (1954). The Commission's anti-collusion restrictions comport fully with these requirements. Prior to adopting its auction rules, the Commission invited public comment as to whether the Commission should adopt rules specifically prohibiting collusive conduct and what these provisions, if adopted, should entail. See Notice of Proposed Rule Making, PP Docket No. 93-253, 8 FCC Rcd 7635, 7650 (1993). After thorough consideration of the numerous comments received, the Commission adopted Section 1.2105(c). It was determined that the requirements specified in Section 1.2105(c) would deter collusive behavior and thereby counteract unfair manipulation of the bidding process without being unduly burdensome. The Commission's underlying concern was that its auctions should be fair and honest, and it designed its anti-collusion restrictions accordingly. See Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2386-88 (1994) (hereinafter Second Report and Order). It is notable that no commenter expressed First Amendment concerns with such provisions.

11. Commercial Realty has provided no evidence contradicting the Commission's determination that Mr. Hartley's discussions with the president of Interactive America Corporation were collusive and that the Commission's anti-collusion restrictions are not unduly burdensome or restrictive. Indeed, it is undisputed that Mr. Hartley initiated the discussions, and that the purpose of the discussions was to discourage other winning bidders from making their down payments by suggesting that the bidders paid too much for their licenses and that they would incur substantial financial losses if they continued to pursue IVDS licenses by timely tendering their down payments. In fact, before defaulting, the record indicates that Mr. Hartley orchestrated a campaign ostensibly to persuade other winning bidders to urge their congressional

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representatives to pressure the Commission to relax its down payment requirements. Commercial Realty and several other bidders, including Interactive America Corporation, subsequently defaulted on their respective down payment obligations. These actions placed the integrity of the IVDS auction at risk.

12. Commercial Realty's unsupported statement that it and others were sold spectrum under false pretenses is equally without merit. Commercial Realty has not explained what it means by this allegation. Moreover, the Commission is unaware of any representations that it made in connection with the auction of IVDS frequencies that could serve as a reasonable basis of a false pretenses claim. In any event, Commercial Realty has not demonstrated in this regard a basis for modifying the forfeiture amount.

13. Commercial Realty's next argument, that it was entitled to claim bidding credits as a woman-owned business, is equally unconvincing. Commercial Realty has correctly stated the Commission's minimum requirements, i.e., 50.1 percent ownership and control, but has failed to demonstrate that Teresa Hartley exercised control over the applicant. See Second Report and Order at 2397.

14. The Commission determines actual or de facto control of any Commission licensee by evaluating the particular facts of each case. In Intermountain Microwave, 24 Rad. Reg. (P&F) 987 (1963), the Commission set forth six factors it uses in resolving an issue of control of a nonbroadcast licensee. The six Intermountain factors are: (a) Does the licensee have unfettered use of all facilities and equipment? (b) Who controls daily operation? (c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (d) Who is in charge of employment, supervision, and dismissal of personnel? (e) Who is in charge of the payment of financing obligations, including expenses arising out of operation?; and (f) Who receives moneys and profits from the operation of the facilities?

15. In applying the Intermountain criteria, the Commission examines the totality of the circumstances. In the case of a proposed nonbroadcast facility where the facility is not yet constructed and there is no record of actual conduct, the Commission has modified the Intermountain criteria to determine who has actual control of the applicant by focusing primarily on the last four Intermountain criteria. See, e.g., La Star Cellular Telephone Co., 9 FCC Rcd 7108, 7109-10 (1994).

16. Analyzed in light of the Intermountain criteria as modified by the La Star case, the record confirms the Commission's determination reached in the NALF that Commercial Realty is not controlled by Mrs. Hartley. During the investigation, Mrs. Hartley admitted that as of January 1995, she had made no major decisions with respect to Commercial Realty and its pursuit of IVDS licenses. All of these decisions were made solely by her husband, James C. Hartley, without any assistance from Mrs. Hartley. Mr. Hartley researched IVDS and decided that it should be pursued. Mr. Hartley decided that Commercial

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Realty would be the vehicle for this pursuit. Mr. Hartley determined what markets Commercial Realty would seek at the auction. Mr. Hartley determined how much it would spend. Mr. Hartley also decided that Commercial Realty would not make its down payment. Commercial Realty does not dispute these facts, which support unequivocally a conclusion that Mr. Hartley, rather than Mrs. Hartley, determined and carried out Commercial Realty's policy decisions.

17. Nor is there any evidence presented that Mrs. Hartley played an active part in Commercial Realty's personnel matters. Rather, Mr. Hartley hired Commercial Realty's IVDS consultant, public relations consultant, engineer, and lawyer, and Mr. Hartley signed all of the checks for their fees. In view of these facts, which are also uncontroverted, it is reasonable to conclude that Commercial Realty's personnel concerns were the sole responsibility of Mr. Hartley. In fact, Mrs. Hartley disclosed that she had no intention of beginning to take an active part in any of Commercial Realty's affairs until it became a licensee providing IVDS service to the public. Mrs. Hartley said that she planned to help with Commercial Realty's accounting and property management and sign its checks, once the corporation becomes a viable IVDS provider, but that she would not do this on a full time basis.

18. There is also no support for the claim that Mrs. Hartley will be responsible for Commercial Realty's financial obligations. While Commercial Realty argues that Mrs. Hartley lent the corporation \$60,000 to enable it to take part in the IVDS auction, it was revealed during the Commission's investigation that the money came from an account that she held jointly with her husband and that his access to the account was unrestricted, notwithstanding their claim that it was her personal money. The source of this \$60,000 was not disclosed. More importantly, Mr. Hartley negotiated an alleged \$4,000,000 loan for Commercial Realty's down payment. At the auction, Mr. Hartley decided the amount of every Commercial Realty bid and when it would cease bidding for each market. It was Mr. Hartley's responsibility to raise the remaining \$30,000,000-plus that Commercial Realty would need to honor its bidding commitment. These facts undermine the professions that Mrs. Hartley was in control of Commercial Realty.

19. There is no record of any profits earned by Commercial Realty. Its sole financial resource appears to be the aforementioned \$60,000 loan. The recipient of the cash was Mr. Hartley who used the money to finance Commercial Realty's participation in the IVDS auction. The only claim concerning Mrs. Hartley in this regard is that she would receive and disburse any revenues that Commercial Realty might generate from its future operations. There has been no evidence presented, however, that she would exercise an independent decision making role. Consequently, it must be concluded that if Commercial Realty were to receive any monies or profits, Mr. Hartley, rather than Mrs. Hartley, would have control over them.

20. In view of the foregoing discussion, it is clear that Mrs. Hartley did

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not exercise control over Commercial Realty. The record of actual conduct with respect to the four pertinent Intermountain criteria, (policy decisions, personnel responsibilities, financial obligations and receipt of monies), reveals a virtual absence of Mrs. Hartley's participation. Nor does it appear that she had any real intention to ever control Commercial Realty. As such, Commercial Realty's claims for bidding credits as a woman-owned business were both abusive and improper.

21 Commercial Realty next argues that IVDS applicants, prior to participating in an auction, are not required to provide the Commission with either estimates of costs that would be incurred in constructing and implementing their proposed facilities or financial statements documenting that they have adequate, available resources to cover their cost estimates. This argument misconstrues the Commissions requirements. Applicants for an IVDS auction are required to complete FCC Form 175 (Application to Participate in an FCC Auction), which includes a certification that the applicant, among other things, is financially qualified. The plain meaning of that certification is that the applicant will have the resources to meet its pertinent financial obligations as they arise and that, if need be, the applicant is prepared to demonstrate that its claim is reasonable. Therefore, every IVDS applicant, at the very least, is expected to have the financial resources readily accessible to meet the down payment requirement. It was determined in the NALF that Commercial Realty's financial certification was completely baseless. It was shown that Commercial Realty entered the auction without securing any credible basis for certifying that it had the financial resources to honor its bids, let alone meet the Commission's construction requirements. The deception was shown to have continued after Commercial Realty completed its bidding. Richard Kent, a director of Commercial Realty, confirmed on each of Commercial Realty's 20 "High Bid Acknowledgment Forms** (FCC Form 178), in addition to confirming the amount of each of Commercial Realty's winning bids, that Commercial Realty had thoroughly reviewed and was willing to be bound by all of the Commissions auction requirements, which includes the requirement that the bidder have the available resources to honor the financial obligations it has incurred. This certification was baseless as well.

V. CONCLUSION

22. We find Commercial Realty's arguments unpersuasive. Therefore, for the reasons set forth above, there is no basis upon which to grant Commercial Realty's Opposition to the NALF or to cancel or reduce the forfeiture.

VI. ORDERING PARAGRAPHS

23. Accordingly, IT IS ORDERED that the Opposition to Notice of Apparent

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Liability for Forfeiture, filed by Commercial Realty St. Pete, Inc. IS DENIED.

24. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Commercial Realty St. Pete, Inc. SHALL FORFEIT to the United States the sum of Three Hundred Ninety Thousand Dollars (\$390,000) for willful and repeated violations of Sections 1.17 and 1.2105(c) of the Commission's Rules, 47 C.F.R. §§ 1.17, 1.2105(c), and willful and repeated abuses of the Commissions processes. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 6067307482.

25. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, as amended 47 U.S.C. § 504(a).

26. IT IS FURTHER ORDERED that a copy of this Order SHALL BE SENT to Commercial Realty St. Pete, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FN1. IVDS is a point-to-multipoint short distance communications service in which licensees may provide information, products, or services to individual subscribers located within a specified service area and subscribers may provide responses.

FN2. The specific forfeitures assessed against Commercial Realty were \$20,000 for anti-collusion rule violations, \$170,000 for improperly claiming bidding credits, and \$200,000 for financial misrepresentations.

FN3. Commercial Realty's up front payments totaled \$10,000.

FN4. Commercial Realty cites the instructions accompanying FCC Form 301 Application for Construction Permit for Commercial Broadcast Station.

FN5. Interactive America Corporation also failed to make its down payment.

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